BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRETT K. POMEROY	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,849
EPIC CONSTRUCTION CO., INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS' FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 3, 1999, Award of Administrative Law Judge Steven J. Howard. Oral argument to the Board was waived by agreement of the parties.

APPEARANCES

Claimant appeared by his attorney, George H. Pearson, III, of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are considered by the Appeals Board for the purposes of this award.

ISSUES

What is the nature and extent of claimant's injury and/or disability? The parties have stipulated that claimant has a 10 percent whole body functional impairment. The only remaining issue is whether claimant is entitled to a work disability under K.S.A. 1997 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of facts and conclusions of law:

The Award sets out findings of fact and conclusions of law that are accurate and supported by the record. The Appeals Board adopts those findings and conclusions as its own as if specifically set forth herein, and affirms the Award of the Administrative Law Judge.

Claimant, a brick mason with 15 years experience, began working for respondent in January 1998. On February 11, 1998, while picking up a 75-pound bucket of grout, claimant experienced a sudden onset of pain in his low back. Claimant advised his supervisor, but did not immediately seek medical attention. He continued working for respondent, although in pain, until July 1998, when he first sought medical treatment. Claimant underwent conservative care with several doctors, including Joseph G. Sankoorikal, M.D., a board certified physical medicine and rehabilitation specialist. Claimant was diagnosed with degenerative disc disease at L4-5 and L5-S1, a bulging disc at L4 and a disc herniation on the left side at L5-S1.

Claimant underwent two epidural injections and was ultimately returned to work by Dr. Sankoorikal with a 10 percent whole body functional impairment. Dr. Sankoorikal restricted claimant to lifting under 50 pounds. Dr. Sankoorikal did caution claimant that he may be unable to return to work as a brick mason. Claimant did return to work for respondent for approximately five weeks. During that time, respondent attempted to accommodate claimant, but claimant was physically unable to continue working as a brick mason. After five weeks, claimant was forced to resign and seek other employment.

Respondent contends that claimant should be limited to his functional impairment as respondent provided claimant accommodated work and continued to offer claimant accommodated work within the restrictions placed upon him by Dr. Sankoorikal. Claimant refused to return to respondent's employment, having attempted to do that work and been unable to do so.

The Appeals Board finds that claimant made a good faith attempt to return to work for respondent after the injury, but was physically unable to perform that heavy labor. Respondent's request that claimant be limited to his functional impairment is denied.

The Administrative Law Judge awarded claimant a 55 percent task loss, which is a split of the 70 percent task loss provided by P. Brent Koprivica, M.D., claimant's expert, and the 40 percent task loss opined by Dr. Sankoorikal, the treating physician. This finding is supported by the record, and the Appeals Board adopts same.

With regard to the loss of wage earnings suffered by claimant under K.S.A. 1997 Supp. 44-510e, the Appeals Board finds that claimant self-limited himself by refusing to accept jobs which paid less than $8 per hour. This self-limitation on claimant's part does not constitute a good faith effort to find a new job. After considering the logic of the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), the Appeals Board imputes that $8 per hour wage to claimant. That results in a wage loss of 74 percent.

Respondent argues claimant should be imputed a wage of at least $12 per hour, as Michael J. Dreiling, respondent's vocational rehabilitation specialist, opined that claimant could earn as much as $12 per hour if he were a painter. However, the Appeals Board finds Mr. Dreiling's opinion to be somewhat speculative and notes that Mr. Dreiling's opinion was couched in the terms of possibilities, rather than probabilities.

The Appeals Board, therefore, finds, based upon the evidence in the record, that claimant is entitled to a 55 percent loss of tasks and 74 percent loss of wage earnings which, when combined, equates to a 64.5 percent permanent partial work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated December 3, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's decision to award claimant a work disability. The record reflects that claimant returned to an accommodated, full-time job with respondent. He was told to work within his restrictions. Other workers were available to assist claimant as needed. The record does not indicate that this job was a sham or that claimant was required to work outside his restrictions. Claimant was specifically told that if a task was too difficult for him, not to do it. Claimant left this job voluntarily. Even so, respondent made an open-ended offer to take him back. Claimant never returned. When claimant was asked whether he would attempt to return to work with respondent if given the assistance of a vocational counselor to insure the tasks were within his restrictions, he said no. Claimant was unwilling to attempt this offer of accommodated employment, even though he was not working elsewhere. This does not constitute good faith.

Under the rationale of Foulk[1] and Copeland[2], the comparable wage of the accommodated job offered claimant by respondent should be imputed, thereby, limiting claimant's award to his percentage of functional impairment.[3]

BOARD MEMBER

c: George H. Pearson, III, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306,944 P.2d 179 (1997).

[3] K.S.A. 1997 Supp. 44-510e.